Mariya Stephen @ Fredolin Milis v Lee Guat Toh

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1125–05 OF 2012
RAMLY ALI, MOHTARUDIN BAKI JJCA AND HAMID SULTAN J
23 SEPTEMBER 2013

Civil Procedure — Adjournment — Application for — Judicial discretion — Application for adjournment on ground of appointment of new solicitors — Adjournment refused — Whether improper exercise of discretion by judge

Civil Procedure — Adjournment — Refusal — Appeal against — Appellate court not to interfere unless injustice caused — Issue of adjournment not raised in memorandum of appeal and therefore cannot be raised during hearing

Civil Procedure — Trial — Submission of no case to answer — Election — Whether failure to direct on issue of election fatal — No evidence led by defendant — Whether all evidence led by plaintiff must be assumed to be correct

Evidence — Adverse inference — Failure to lead evidence — Submission of no case to answer — Whether adverse inference could be drawn against defendant — Evidence Act 1950 s 114(g)

The plaintiff/respondent's claim in essence was that her land was fraudulently or wrongly transferred by the defendant/appellant. On the date of hearing the appellant sought an adjournment on the ground of appointment of new solicitors. The learned trial judge ('judge') refused the adjournment and proceeded with the trial. At the end of the respondent's case the appellant chose to submit no case to answer. The judge after having gone through the evidence of the respondent found in favour of the respondent. The appellant appealed against the decision.

Held, dismissing the appeal with costs of RM5,000:

(1) It is well settled that the matter of adjournment is within the discretion of the trial judge and an appellate court will not interfere with a refusal of adjournment unless it appears that the result of such a refusal has been to defeat the rights of an applicant altogether or it is an injustice to such an applicant; *Re Dato Mohamed Pilus bin Yusof ex-parte Southern Bank Berhad* [1988] 1 MLJ 536 referred (see para 6).

(2) The appellant had not raised the issue of adjournment in the memorandum of appeal and in consequence it was not proper to raise it during the hearing of appeal. In addition, taking into the factual matrix of the case, there was no improper exercise of discretion by the judge (see para 8).

(3) A submission of no case to answer in all likelihood will be fatal unless the plaintiff has not satisfied the legal burden according to law, or the plaintiff has no case or locus according to law (see para 9); *Thor Eagle Maritime Agencies v Innovest Bhd* [2009] 6 MLJ 74 referred.

(4) Once the plaintiff closes the cases and the defendant does not call witness the law assumes that issues on fact is not in dispute and all the evidence led by the plaintiff must be assumed to be true. The proposition in *Yuill v Yuill P [1945]* which require the court to put the defence counsel to 'election' in the event the defence choses to submit no case to answer does not have the support in the statute or rules of court and over the years through the development of case laws such as *Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, the issue of election has been whittled down; *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81 referred (see para 10).

(5) Section 114(g) of the Evidence Act 1950 will also stand to support the plaintiff's case on facts when the defendant does not call witness and submit no case to answer whether or not the court has cautioned the defendant (see para 11).

(6) A 'non direction' of the judge on the issue of election and 'no case to answer' will not be fatal (s 71 of the Courts of Judicature Act 1964). The court always has the option to make suitable order according to the justice of the case (see para 12).

[Bahasa Malaysia summary

Tuntutan plaintif/responden pada dasarnya adalah bahawa tanahnya dipindahkan secara penipuan atau salah oleh defendan/perayu. Pada tarikh pendengaran perayu memohon penangguhan atas alasan pelantikan peguam baru. Hakim perbicaraan yang bijaksana ('hakim') menolak penangguhan dan meneruskan dengan perbicaraan. Pada akhir kes responden, perayu memilih untuk menghujahkan tiada kes untuk dijawab. Hakim setelah mempertimbangkan keterangan responden memihak kepada responden. Perayu merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos sebanyak RM5,000:

(1) Adalah ditetapkan bahawa perkara penangguhan adalah dalam budi bicara hakim perbicaraan dan mahkamah rayuan tidak akan campur

tangan dengan penolakan penangguhan kecuali jika keputusan penolakan sedemikian menentang sama sekali hak-hak pemohon atau adalah ketidakadilan kepada pemohon sedemikian; *Re Dato Mohamed Pilus bin Yusof ex-parte Southern Bank Berhad* [1988] 1 MLJ 536 dirujuk (lihat perenggan 6).

(2) Perayu tidak membangkitkan isu penangguhan di dalam memorandum rayuan dan oleh itu, adalah tidak betul untuk membangkitkannya semasa pendengaran rayuan. Selanjutnya, mengambil kira fakta matriks kes, tiada pelaksanaan budi bicara yang tidak betul oleh hakim (lihat perenggan 8).

(3) Penghujahan tiada kes untuk dijawab besar kemungkinan akan menjadi kritikal kecuali plaintif tidak memenuhi beban di sisi undang-undang mengikut undang-undang, atau plaintif tiada kes atau locus mengikut undang-undang (lihat perenggan 9); *Thor Eagle Maritime Agencies v Innovest Bhd* [2009] 6 MLJ 74 dirujuk.

(4) Apabila plaintif menutup kes dan defendan tidak memanggil saksi undang-undang menganggap bahawa isu-isu atas fakta bukan dalam pertikaian dan kesemua keterangan yang dikemukakan oleh plaintif mesti dianggap benar. Kenyataan di dalam kes *Yuill v Yuill P [1945]* yang memerlukan mahkamah untuk meletakkan peguam bela kepada 'election' jika pembelaan memilih untuk menghujahkan tiada kes untuk dijawab tidak mempunyai sokongan dalam statut atau peraturan-peraturan mahkamah dan selama ini melalui perkembangan kes undang-undang seperti kes *Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, isu pilihan telah menjadi kurang; *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81 dirujuk (lihat perenggan 10).

(5) Seksyen 114(g) Akta Keterangan 1950 juga akan menyokong kes plaintif atas fakta apabila defendan tidak memanggil saksi dan menghujahkan tiada kes untuk dijawab sama ada atau tidak mahkamah telah memperingatkan defendan (lihat perenggan 11).

(6) Satu 'non direction' oleh hakim atas isu pilihan dan 'no case to answer' tidak akan menjadi kritikal (s 71 Akta Mahkamah Kehakiman 1964). Mahkamah sentiasa mempunyai opsyen untuk membuat perintah bersesuaian dengan keadilan kes (lihat perenggan 12).]

Notes

For a case on failure to lead evidence, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 284.

For cases on application for adjournment, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 240–257.

For cases on refusal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 259–268.

For cases on submission of no case to answer, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 9445–9456.

Cases referred to

Dato Mohamed Pilus bin Yusof ex-parte Southern Bank Berhad, Re [1988] 1 MLJ 536 (refd)

Insas Bhd & Anor v Ayer Molek Rubber Co Bhd [1995] 2 MLJ 833; [1995] 3 AMR 2127, FC (refd)

Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)

Simirah v Chua Hock Lee & Anor [1963] 1 MLJ 239, CA (refd)

Subry bin Hamid v Hussain bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229; [2006] 4 CLJ 57, CA (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Thor Eagle Maritime Agencies v Innovest Bhd [2009] 6 MLJ 74, HC (refd)

Yuill v Yuill [1945] P 15, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11
Courts of Judicature Act 1964 s 71
Evidence Act 1950 s 114(g)
Rules of Court 2012 O 32 r 4, O 35 r 3

Appeal from: Suit No KK-22–186 of 2012 (High Court, Kota Kinabalu)

Ronny Cham (Ronny Cham & Co) for the appellant.
Victor Chong (Poh and Victor Chong) for the respondent.

Hamid Sultan J (delivering judgment of the court):

[1] The appellant/defendant appeals against the decision of the learned trial judge who allowed the respondent/plaintiff claim premised on declaration as well as relief. We heard the appeal on 13 May 2013 and dismissed it on the same date. My learned brothers Ramly Ali JCA and Mohtarudin Baki JCA have read the judgment and approved the same. This is our judgment.

[2] The respondent's prayer in the statement of claim reads as follows:

(a) an injunction to restrain the defendant, her servants and agents from encroaching on the said property held under document of title No NT 013090607;

(b) a declaration that the plaintiff is the rightful owner of the said property held under document of title No NT 013090607;

(c) a declaration that the memorandum of charge registered on 23 September 1991 under register memo No 01018854 is null and void;

(d) a declaration that the memorandum of charge registered on 14 February 1997 under register memo No 01022889 is null and void;

(e) a declaration that the memorandum of transfer registered on 15 February 2002 under register memo No 01026187 is null and void;

(f) an order that the defendant do within seven days return the original document title of deed No NT 013090607 to the said property to the plaintiff;

(g) an order directing that the registrar of the lands and surveys department do immediately upon receiving the original document title deed No NT 013090607 from the plaintiff and/or her solicitors cancel the endorsements of register memo No 01018854 dated 23 September 1991, register memo No 01022889 dated 14 February 1997 and register memo No 01026187 dated 15 February 2002 in the document title deed No NT 013090607 and immediately thereafter return the original document title deed No NT 013090607 to the plaintiff or her solicitors;

(h) damages for fraud to be assessed;

(i) discretionary interest at the rate of 8%/pa pursuant to s 11 of the Civil Law Act 1956 on the amount adjudged from 15th February 2002 until the date of judgment;

(j) statutory interest at the rate of 8%/pa on the amount adjudged from the date of judgment till the date of full payment;

(k) costs to be taxed unless otherwise agreed; and

(l) any consequential and/or other just or better relief that this honourable court may deem fit to award.

THE BRIEF FACTS

[3] The respondent's claim in essence was that her land was fraudulently and/or wrongly transferred by the defendant. On the date of hearing the

appellant sought an adjournment on the ground of appointment of new solicitors. The learned trial judge refused the adjournment and proceeded with the trial. At the end of the respondent's case the appellant chose to submit no case to answer.

[4] The learned trial judge after having gone through the evidence of the respondent found in favour of the respondent. The appellant in the memorandum of appeal complains as follows:

(a) The learned judge failed to give sufficient judicial appreciation to the agreed facts and issues of the case in that his 'Ruling' which was delivered on second May 2012 was made without any broad ground being given. The ground of decision has yet to be given.

(b) The learned judge erred in law and in fact in holding that the respondent had proved their claims against the appellant when the totality of the documentary and oral evidence and the proper application of the provisions of the Sabah Land Ordinance in the case had clearly shown that the respondent had fallen far short of having proved her claim against the appellant which was premised on fraud, deception and conspiracy to defraud beyond reasonable doubt.

(c) As a whole, the learned judge erred in law and in fact in taking into account irrelevant considerations and in failing to give due weight to relevant considerations.

(d) In all the circumstances of the case, the judgment of the learned judge was wrong and ought to be set aside with costs to the appellant here and in the court below.

[5] The learned trial judge had made the following orders namely:

(a) It is hereby declared that plaintiff is the rightful owner of the said property held under document of title No NT 013090607;

(b) It is hereby declared that the memorandum of charge registered on 23 September 1991 under register memo No 01018854 is null and void;

(c) It is hereby declared that the memorandum of charge registered on 14 February 1997 under register memo No 01022889 is null and void;

(d) It is hereby declared that the memorandum of transfer registered on 15 February 2002 under register memo No 01026187 is null and void;

(e) It is hereby ordered that the defendant do within seven days return the original document title of deed No NT 013090607 to the said property to the plaintiff;

(f) It is hereby directed that the registrar of the lands and rurveys department do immediately upon receiving the original document title deed No NT

013090607 from the plaintiff and/or her solicitors cancel the endorsements of register memo No 01018854 dated 23 September 1991, register memo No 01022889 dated 14 February 1997 and register memo No 01026187 dated 15 February 2002 in the document title deed No NT 01309607 and immediately thereafter return the original document title deed No NT 013090607 to the plaintiff or her solicitors; and

(g) Costs to be taxed unless otherwise agreed.

[6] The appellant before us complains that the adjournment should have been given forgetting the trite principle that it is entirely with the discretion of the court O 32 r 4; O 35 r 3 of the Rules of Court 2012 ('ROC 2012'). It is also well settled that the matter of adjournment is within the discretion of the trial judge and an appellate court will not interfere with a refusal of adjournment unless it appears that the result of such a refusal has been to defeat the rights of an applicant altogether or it is an injustice to such an applicant, (see *Re Dato Mohamed Pilus bin Yusof ex-parte Southern Bank Berhad* [1988] 1 MLJ 536).

[7] Further, it is also well settled that an appeal cannot be based solely on adjournment per se, though a court in dealing with appeal proper can consider the issue of adjournment and injustice and make suitable order for rehearing as the justice of the case may demand, (see *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd* [1995] 2 MLJ 833; [1995] 3 AMR 2127).

[8] In the instant case the appellant has not raised the issue of adjournment in the memorandum of appeal and in consequence it is not proper to raise it during the hearing of appeal. In addition taking into the factual matrix of the case, we do not think there was any improper exercise of discretion by the learned judge.

[9] We have read the appeal record and the submission of the parties in detail. We are grateful to the counsel for the comprehensive submission. After having given much consideration to the submission of the learned counsel for the appellant, we take the view the appeal must be dismissed. Our reasons, inter alia, are as follows:

(a) It is well known from decided cases that a submission of no case to answer in all likelihood will be fatal unless the plaintiff's have not satisfied the legal burden according to law, or the plaintiff's has no case or locus according to law, etc. In *Thor Eagle Maritime Agencies v Innovest Bhd* [2009] 6 MLJ 74, the court considered the prevailing considerations in relation to no case to answer as follows:

In *Abang Hj Jaya bin Datu Benteral v Chee Kian Sian* [1954] SCR 12 the court opined that when magistrates are adjudicating in civil cases they should normally follow the practice approved in English civil cases of not ruling that there is no case to answer until the defence have made their election whether they will call evidence.

If the defence elects to give evidence, that evidence should first be heard. A distinction should be borne in mind between a case where at the close of the plaintiff's evidence the judge is asked to rule as a matter of law that the plaintiff has failed to establish his case, and a case where at the close of the plaintiff's case the judge is asked to rule that the evidence is insufficient to support it. In *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4 Sinnathuray J observed:

> On the subject of no case to answer, a summary of the practice of the Court of England is to be found in the White Book at 35/7/2. The last time the practice, was judicially considered is in the Court of Appeal decision *Storey v Storey*.

There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case, there may be a submission that, accepting the plaintiffs evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

In my judgment, it would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiffs case, without putting the defendant to his election, whether to call evidence or not, if his submission fails. It is trite to say that we have a young legal profession and a fused one. Most are small practitioners and engage in many fields of law. The time and effort put in litigation matters are diffused. Such a practice therefore will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the hearing. Altogether, the practice will bring about a saving of costs for the parties.

In contrast to UN Pandey, the Singapore Court of Appeal in *Tan Song Gou v Goh Ya Tian* [1983] 1 MLJ 60 stated that the proper practice, if counsel for defendant wishes to make a submission of no case to answer, is for the judge to refuse to rule on it unless counsel elects to call no evidence.

In *Ramayee Gengan & Ors v Tan Yik Kok & Anor* [1983] 1 CLJ 326 on the issue of no case to answer, Mohd Dzaiddin J (as he then was) observed:

> Counsel for the defendants then informed the court that he would submit there was 'no case to answer'. Before deciding whether to accept his request, I reminded counsel of the election available to the defence and that his case would stand or fall on his submission of 'no case to answer'. Counsel indicated that he would abide by such decision.

In allowing counsel's application, I relied on the English practice. In the Supreme Court Practice 1979, Vol 1, p 571, under heading 'No Case to Answer', it is stated as follows:

> As to the inconvenience of asking a judge sitting alone to hold that there is no case to answer at the conclusion of the evidence of the party on whom the onus lies, see *Alexander v Rayson* [1936] 1 KB 169. The judge should generally refuse to rule on such a submission by the defendant unless he makes it clear that the does not intend to call evidence (*Laurie v Raglan Co* [1942] 1 KB 152 (CA)) but the judge is not bound so to refuse, and if he does not put the party to his election whether to call evidence or not, the latter retains his right to call it if his submission fails (*Young v Rank* [1950] 2 KB 510: *Storey v Storey* [1961] P 63 (CA)). A submission of no case may be made either if no case has been established in law or the evidence led is so unsatisfactory or unreliable that the court should hold that the burden has not been discharged (ibid and *Yuill v Yuill* [1945] P 15).

In addition to the White Book, I also rely on the decision of Thomson CJ (as he then was) in *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239 at p 241 (CA) at p 241 he stated as follows:

> Having come to that conclusion the question then arises what this court should do in view of the course taken at the trial by counsel for the defendants when he submitted that there was no case to answer.

It is a great pity that when this submission was made the advice of Goddard LJ (as he then was) in the case of *Parry v Aluminium Corporation*, Ltd was disregarded. His Lordship then observed that in cases of negligence if a judge is to rule at the end of the plaintiff's case that the plaintiff had made out no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence. That statement as to the practice which should be followed in such circumstances has been approved again and again (*Laurie v Raglan Building Co Ltd*; *Yuill v Yuill*; *Storey v Storey*).

[10] Once the plaintiff closes the cases and the defendant does not call witness the law assumes that issues on fact is not in dispute and all the evidence led by the plaintiff must be assumed to be true, (see *Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509). Cases like *Simirah v Chua Hock Lee & Anor* [1963] 1 MLJ 239 which had relied on Lord Green MR proposition in *Yuill v Yuill* [1945] P 15 which require the court to put the defence counsel to 'election' in the event the defence choses to submit no case to answer does not have the support in the statute or rules of court and over the years through the development of case laws such as *Jaafar bin Shaari*, the issue of election has been whittled down. The proposition of Lord Green in respect of election reads as follows:

> The practice which has been laid down amount to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so

> elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission.

[11] Section 114(g) of the Evidence Act 1950 will also stand to support the plaintiff's case on facts when the defendant does not call witness and submit no case to answer whether or not the court has cautioned the defendant. In *Subry bin Hamid v Hussain bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229; [2006] 4 CLJ 57, Gopal Sri Ram JCA sitting in the Court of Appeal had dealt with the rules relating to 'no case to answer' and 'election'. And in *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 the Court of Appeal in the quorum consisting of Gopal Sri Ram JCA had whittled down the strict rule stated in *Yuill v Yuill*. Suriyadi Halim Omar JCA (as he then was) had this to say:

> One last hurdle to be considered was, even though the appeal was a rehearing, bearing in mind that it emanated from a case tried by a judge alone, should it have been sent back for a new trial in the circumstances of the case (*Young v Rank* [1950] 2 KB 510)? Having perused the notes of proceedings, it was clear that the submission of the respondent was of no case to answer simpliciter. It was not a submission of no case to answer based on unsatisfactory or unreliable nature of the evidence led by the plaintiff, and which would have caused us some trouble in arriving at a just decision (*Storey v Storey*; *Yuill v Yuill* [1945] 1 All ER 183 CA). Having considered the matter in its entirety we found no reason whatsoever to have it remitted for a new and costly trial. On reflection even if it were ordered the presiding court would eventually have found the case for the appellant.

[12] Leaving aside the case laws as far as the statute is concerned a 'non direction' of the judge on the issue of election and 'no case to answer' will not be fatal (see s 71 of the Courts of Judicature Act 1964 ('CJA 1964')). The court always has the option to make suitable order according to the justice of the case. When the defence chose not to call evidence or an adjournment is not granted for valid reasons; in this time and era, parties ought to know the consequence and cannot claim prejudice if there was any non direction by the judge on this issue. *Yuill v Yuill* is a decision which was decided at a time the concept of 'just, expeditious and economical disposal' of cases was not in place and no equipollent section such as s 71 of the CJA 1964 was available then. The Malaysian jurisprudence on the failure to call evidence as well as the Rules of Court 2012 will not permit the defence to take lackadaisical attitude in not calling evidence.

[13] In the instant case the appellant does not complain of 'election' as one of the grounds stated above but rather on a finding of the facts of the learned trial judge that too after hearing of evidence by way of the plaintiffs witnesses. The

legal consequence in such circumstances is fatal. In *Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 the Supreme Court had this to say:

> Since counsel for the respondents did not actually say that he wished to make a submission of no case to answer, the trial court was under no obligation to put to the election of counsel that he would not call any evidence. The respondents had, however, chosen to close their case at the end of the appellants' case, and they were entitled to do so although they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances require such an adverse inference to be invoked against them.

(see *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381).

[14] It is also well settled that once the defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[15] We also have gone through the notes of evidence and relevant document and we do not see any merit in the appellant's complaint.

[16] For reasons stated above the appeal is dismissed with costs of RM5,000 to be paid by the appellant to the respondent.

We hereby order so.

Appeal dismissed with costs of RM5,000.

Reported by Kanesh Sundrum